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In the Supreme Court of the United States

No. 142

OCTOBER TERM, 19[illegible]

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,
Appellant,

vs.

GEORGE LEONARD,
Appellee.

Appeal from the Supreme Court of the State of Ohio.

JURISDICTIONAL STATEMENT.

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TABLE OF CONTENTS.

Opinions Below ---------- 1

Jurisdiction ---------- 2

Questions Presented by the Appeal ---------- 3

Statement of the Case ---------- 4

1. The Facts ---------- 4
2. How the Federal Question Is Presented ---------- 5
3. The Federal Question Is Substantial ---------- 7
4. The Appellate Jurisdiction of the Court is Properly Evoked ---------- 14

Appendices:

A. Journal Entry of the Court of Common Pleas of Cuyahoga County, Ohio, Overruling Defendant's Motion for New Trial ---------- 19

B. Journal Entry of the Court of Appeals of Cuyahoga County, Ohio, Dismissing Appellant's Appeal ---------- 20

C. Motion Docket Decision of the Supreme Court of Ohio, February 2, 1955 ---------- 21

D. Per Curiam Opinion of the Supreme Court of Ohio (162 O. S. 548) ---------- 22

TABLE OF AUTHORITIES.

Cases.

Bailey v. Central Vermont Ry. Co., 319 U. S. 350 ---- 13

Brady v. Southern R. Co., 320 U. S. 476 (1943) ---- 9

Brown v. Western Ry. of Alabama, 338 U. S. 294 (1949) ---------- 9, 13

Central Vermont R. Co. v. White, 238 U. S. 507 (1915) 9

Chesapeake & Ohio R. Co. v. Carnahan, 241 U. S. 241 (1916) ---------- 7, 17

Chesapeake & Ohio R. Co. v. Kelly, 241 U. S. 485 (1916) ---------- 7, 17

Dahnke-Walker Milling Co. v. Bondurant, 257 U. S. 282 (1921) ---------- 3, 14

Dice v. Akron, Canton & Youngstown R. Co., 342 U. S. 359 ---------- 10, 11, 13

Erie R. Co. v. Tompkins, 304 U. S. 64 (1938) ---------- 9

Fiske v. State of Kansas, 274 U. S. 380 (1927) ---------- 3, 14, 16

Fleming v. Rhodes, 331 U. S. 100 (1947) ---------- 3, 16

Louisville & Nashville R. Co. v. Stewart, 241 U. S. 261 (1916) ---------- 7, 17

Minneapolis & St. Louis R. Co. v. Bombolis, 241 U. S. 211 ---------- 7, 10, 11, 12, 13, 17

St. Louis & San Francisco R. Co. v. Brown, 241 U. S. 223 (1916) ---------- 7, 17

Twining v. New Jersey, 211 U. S. 78 (1908) ---------- 8, 9

Urie v. Thompson, 337 U. S. 163 (1949) ---------- 9

Statutes.

Federal Employers' Liability Act, 45 U. S. C. §§ 51 *et seq.* ---------- 2, 4

Judicial Code:

Section 1257 (28 U. S. C. 1257) ---------- 2, 14, 17

Former Section 236 ---------- 17

Former Section 237 ---------- 15, 17

Ohio Revised Code, Section 2315.09 ---------- 3, 5

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OCTOBER TERM, 1954.

THE NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,
Appellant,

vs.

GEORGE LEONARD,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgment of the Supreme Court of the State of Ohio, rendered in this case on February 2, 1955, dismissing Appellant's appeal as of right. This statement is submitted for the purpose of showing that the Supreme Court of the United States has jurisdiction to hear this appeal and that a substantial question is presented.

OPINIONS BELOW.

Neither the Court of Common Pleas nor the Court of Appeals have written opinions in this cause. The journal entry of the Court of Common Pleas of Cuyahoga County, Ohio, overruling defendant's motion for a new trial is attached hereto as Appendix A. The journal entry of the Court of Appeals of Cuyahoga County, Ohio, dismissing Appellant's appeal is attached hereto as Appendix B. The

per curiam opinion of the Supreme Court of Ohio dismissing Appellant's appeal as of right is attached hereto as Appendix C.

JURISDICTION.

(i) This action was brought in the Court of Common Pleas of Cuyahoga County, Ohio, pursuant to the Federal Employers' Liability Act, 45 U. S. C. §§ 51 *et seq.* Jurisdiction of causes of action of this nature is conferred upon the Court of Common Pleas of Cuyahoga County, Ohio, by 45 U. S. C. § 56, the applicable portion of which reads:

> "The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several states."

(ii) The date of the judgment of the Supreme Court of the State of Ohio, here sought to be reviewed, is February 2, 1955, on which date said court filed its journal entry, dismissing Appellant's appeal as of right. Appellant filed its notice of appeal with said court on April 14, 1955.

(iii) The statutory provision believed to confer jurisdiction of the appeal upon this Court is Section 1257 of Title 28, United States Code, which provides as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) *By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.*
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn

in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." (Emphasis supplied.)

(iv) The cases believed to sustain the jurisdiction of the Supreme Court of the United States to hear this case, are *Fiske v. State of Kansas*, 274 U. S. 380 (1927) and *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282 (1921). *See also*: Dissenting Opinion of Mr. Justice Frankfurter, in *Fleming v. Rhodes*, 331 U. S. 100, 108 (1947).

(v) This appeal draws in question the validity of Section 2315.09 of the Ohio Revised Code, Title 23, page 333, Page's Ohio Revised Code, as applied to this case by the Supreme Court of Ohio. Such statute provides as follows:

"*In all civil actions a jury shall render a verdict upon the concurrence of three-fourths or more of their number.* The verdict shall be in writing and signed by each of such jurors concurring therein, and they must then be conducted into court, where their names shall be called by the clerk, and the verdict handed to the clerk by the foreman. The clerk must then read the verdict to the jury and make inquiry if it is the verdict of three-fourths or more of their number." (Emphasis supplied.)

QUESTIONS PRESENTED BY THE APPEAL.

The following questions are presented by this appeal:

1. Whether or not an Ohio statute (Ohio Rev. Code § 2315.09) permitting a jury in civil actions to return a verdict upon the concurrence of three-fourths of their

number is void as applied to actions brought pursuant to the Federal Employers' Liability Act, 45 U. S. C. §§ 51 *et seq.*, in view of the Seventh Amendment to the Constitution of the United States, which provides:

> "In suits at common law, where the value in controversy shall exceed Twenty Dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

2. Whether or not, in actions tried in state courts pursuant to the Federal Employers' Liability Act, 45 U. S. C. §§ 51 *et seq.*, questions concerning the right to and character of trial by jury are matters of "substance" so as to require the application of federal law.

STATEMENT OF THE CASE.

1. The Facts.

This case was a negligence action commenced in the Common Pleas Court of Cuyahoga County, Ohio, pursuant to the provisions of the Federal Employers' Liability Act. The defendant admitted liability in the case. The only question raised was as to the amount of damages. The case was tried before Judge Donald Lybarger of said court and a jury of twelve. The jury returned a verdict in the sum of $60,000.00 (Record, p. 424.) The verdict of the jury was signed by only nine jurors. (Record, p. 424.) Defendant's motion for new trial was overruled by the trial court. (Record, p. 419.) The judgment of the Court of Common Pleas of Cuyahoga County was affirmed without opinion by the Court of Appeals of said county on November 5, 1954. (Appendix B.) (Record, p. 67.)

Plaintiff (Appellee), George Leonard, was employed as a yard conductor by the defendant railroad company (Appellant). On January 19, 1953, he was seated in a caboose which had been detached from a train and was standing on a track in defendant's yard. Defendant's employees were at that time engaged in an operation whereby a cut of cars would be coupled to this caboose. Because of a defective coupling the cut of cars was caused to strike the caboose with such force that the plaintiff was thrown against a corner of the caboose, causing injury to his back. The issue for the jury was the character and extent of Mr. Leonard's injuries.

2. How the Federal Question Is Presented.

At the close of the case, the Court instructed the jury that three-fourths of their number might return a verdict. (Record, p. 411.) Appellant's general exception to the charge was overruled. (Record, p. 413.) The verdict in favor of the plaintiff (Appellee) was signed by nine members of the jury. Section 2315.09 of the Ohio Revised Code provides for a jury verdict in civil actions upon the concurrence of three-fourths of the members of the jury. The Seventh Amendment to the Constitution of the United States, however, provides that, in suits at common law involving more than $20.00, the right of trial by jury shall be in accordance with the "rules of the common law." Judgment was entered on the verdict on March 9, 1954. Appellant thereafter, on motion for new trial, challenged the trial court's charge to the jury and its receipt of the jury's verdict on the ground that federal law controls the question of trial by jury and that a unanimous verdict of twelve jurors was, therefore, requisite. Appellant contended both in its motion for new trial (Motion for New Trial, Specifications 4 and 5) and in the brief attached thereto that the

Trial Court erred in instructing the jury that, in a Federal Employers' Liability Act case, three-fourths of their number might return a verdict and in receiving a verdict signed by only nine jurors, contrary to controlling federal law. (Record, pp. 420 & 422.)

Defendant's motion for new trial was overruled by the Court of Common Pleas of Cuyahoga County on March 9, 1954. (Appendix A.) Appellant thereafter appealed to the Court of Appeals of Cuyahoga County, Ohio. Before the Court of Appeals, Appellant raised the question of its right to a unanimous verdict of twelve jurors in cases tried pursuant to the Federal Employers' Liability Act, by Assignment of Error No. 2, and by the portion of its brief devoted to Assignment of Error No. 2, in which Appellant maintained that the Court had erred in instructing the jury that three-fourths of their number may arrive at a verdict. (Record, pp. 77-80.) Appellant contended that the verdict in this case, signed by nine jurors, did not comply with applicable federal law. The Court of Appeals on November 5, 1954 dismissed Appellant's appeal (Appendix B), and Appellant then took an appeal as of right to the Supreme Court of Ohio. In conjunction with its appeal as of right, Appellant also moved to certify the record. In its notice of appeal to the Supreme Court of Ohio, Appellant merely stated that a constitutional question was involved. (Record, p. 66.) In its brief filed in support of the appeal and motion to certify, Appellant contended that the Seventh Amendment to the Constitution of the United States controls the right to trial by jury in Federal Employers' Liability Act cases tried in state Courts. (Record, pp. 56-61.) On February 2, 1955, the Supreme Court of Ohio dismissed Appellant's appeal.

3. The Federal Question Is Substantial.

The question raised by this appeal was first posed before this honorable Court in 1916, in the case of *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U. S. 211. In that case, the court held that the constitution and laws of Minnesota permitting a jury to reach a verdict upon the concurrence of five-sixths of its number was properly applied to an action brought in a state court pursuant to the Federal Employers' Liability Act. The defendant in the *Bombolis* case, like Appellant in this case, contended that the application of Minnesota law resulted in a violation of its right to a unanimous verdict of the members of the jury as required by the Seventh Amendment to the Constitution of the United States. The decision in the *Bombolis* case set at rest the same contention which had been raised in four other cases then pending before the court. *Chesapeake & Ohio R. Co. v. Kelly*, 241 U. S. 485 (1916); *Louisville & Nashville R. Co. v. Stewart*, 241 U. S. 261 (1916); *Chesapeake & Ohio R. Co. v. Carnahan*, 241 U. S. 241 (1914); and *St. Louis & San Francisco R. Co. v. Brown*, 241 U. S. 223 (1916).

The decision in the *Bombolis* case rested upon two general propositions. First, it was said that the first ten amendments of the Constitution of the United States serve as limitations upon the federal government, its agencies and instrumentalities and not upon the states. Secondly, the Court stated that state courts derived their authoriy from state law and that this principle is not altered in a situation where the jurisdiction of the state courts over a specific federal cause of action is prescribed by federal statute. In regard to the second proposition, the court held that the powers of state courts remain constantly dependent upon the authority creating the courts and do

not vary from case to case depending upon the authority from which the courts receive jurisdiction over specific causes of action. Chief Justice White, who delivered the opinion of the court, foresaw, as resulting from any contrary theory, a "fluctuating hybridization." In that respect, he said:

> "* * * That is to say, whether they should be considered as state or as Federal courts would from day to day depend not upon the character and source of the authority with which they were endowed by the government creating them, but upon the mere subject matter of the controversy which they were considering.
>
> "But here again the error of the proposition is completely demonstrated by previous adjudications (citations omitted). Moreover, the proposition is in conflict with an essential principle upon which our dual constitutional system of government rests; that is, that lawful rights of the citizen, whether arising from a legitimate exercise of state or national power, unless excepted by express constitutional limitation or by valid legislation to that effect, are concurrently subject to be enforced in the courts of the state or nation when such rights come within the general scope of the jurisdiction conferred upon such courts by the authority, state or nation, creating them. * * *" (241 U. S. 221.)

Certainly it must be admitted as a general postulate of constitutional law that the first ten amendments to the Constitution of the United States serve as limitations upon federal rather than state authority, except where the rights secured by certain of the first ten have been held to be so fundamental as to require application to state authority under the "due process" clause of the Fourteenth Amendment. e.g., *Twining v. New Jersey*, 211 U. S. 78 (1908). Even then it is said that such rights are se-

cured as against the states, not because they appear in the first ten amendments, but because they are part and parcel of "due process." *Twining v. New Jersey, supra.* As to Chief Justice White's fear of a "fluctuating hybridization," it may be said that it has, to some extent, already become a reality by virtue of certain rules of law applied to conflicts between state and federal law. For instance, in *Erie R. Co. v. Tompkins,* 304 U. S. 64 (1938), it was held that an action in which the jurisdiction of a federal court is founded upon diversity of citizenship, the court is bound by the substantive law of the state wherein it sits, although it may freely follow federal rules of procedure. The reverse of this proposition is true in FELA cases tried in the courts of the various states. In such cases, the state courts are bound to follow federal substantive law, but may utilize local principles in ruling upon matters of procedure. *Brown v. Western Ry. of Alabama,* 338 U. S. 294 (1949); *Central Vermont R. Co. v. White,* 238 U. S. 507 (1915).

It was stated in the *Brown* case that the point dividing "substance" from "procedure" is incapable of precise calculation. 338 U. S. 296. It is apparent, nevertheless, that once a specific question has been held by the Supreme Court to fall within the purview of federal principles, that question continues to be subject to determination based on federal law whether or not it is clearly denominated "substance." For example, in the *Brown* case, it was held that state rules of pleading which conflict with federal rights are unavailing in FELA cases. See also: *Urie v. Thompson,* 337 U. S. 163 (1949). In *Central Vermont R. Co. v. White, supra,* it was established that in FELA cases the burden of proof of contributory negligence must conform to federal law. By the same token, in *Brady v. Southern R. Co.,* 320 U. S. 476 (1943), the court ruled that the sufficiency of the evidence is controlled by federal

principles in a FELA case tried in a state court. It is upon the proposition asserted in this line of decisions that appellant rests its appeal.

For 36 years, the *Bombolis* decision stood virtually unquestioned. Then, in 1952, this Honorable Court decided the case of *Dice v. Akron, Canton & Youngstown R. Co.*, 342 U. S. 359. In that case, the plaintiff filed an action under the Federal Employers' Liability Act in the Common Pleas Court of Summit County, Ohio. The defendant, railroad, filed an answer denying liability and, as an affirmative defense, set up a release signed by the plaintiff in which he quit-claimed any action he might have against the railroad resulting from the accident in question. The plaintiff contended that the release had been procured by fraud. Ohio is one of the few states which still adhere to the old separation of law and equity. Consequently, the trial court set aside a verdict for the plaintiff on the ground that the question of fraud in the procurement of the release was one to be decided by the court rather than the jury and that there was insufficient evidence of fraud in the procurement of such release. The Court of Appeals reversed the trial court on the ground that the question of fraud must be determined by a jury under applicable federal principles. The Supreme Court of Ohio reversed the Court of Appeals and reinstated the judgment of the Common Pleas Court. In reversing the Supreme Court of Ohio, the Supreme Court of the United States stated at page 363:

> "We have previously held that 'The right to trial by jury is "a basic and fundamental feature of our system of federal jurisprudence" ' and that it is 'part and parcel of the remedy afforded railroad workers under the Employers Liability Act.' Bailey v. Central Vermont R. Co. 319 US 350, 354, 87 L ed 1444, 1447, 63

S Ct 1062. We also recognized in that case that to deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence 'is to take away a goodly portion of the relief which Congress has afforded them.' It follows that the right to trial by jury is too substantial a part of the rights accorded by the Act to permit it to be classified as a mere 'local rule of procedure' for denial in the manner that Ohio has here used. Brown v. Western R. Co. 338 US 294, 94 L ed 100, 70 S Ct 105."

The majority of the Court in the *Dice* case was able to distinguish *Bombolis* in the manner indicated by the following language:

"* * * The Bombolis Case might be more in point had Ohio abolished trial by jury in all negligence cases including those arising under the federal Act. But Ohio has not done this. It has provided jury trials for cases arising under the federal Act but seeks to single out one phase of the question of fraudulent releases for determination by a judge rather than by a jury. Compare Testa v. Katt, 330 US 386, 91 L ed 967, 67 S Ct 810, 172 ALR 225." (342 U. S. 363)

Mr. Justice Frankfurter concurred for a reversal but dissented from the reasoning of the majority opinion. In a separate opinion in which Justices Reed, Jackson and Burton concurred, he stated:

"Ohio and her sister States with a similar division of functions between law and equity are not trying to evade their duty under the Federal Employers' Liability Act; nor are they trying to make it more difficult for railroad workers to recover, than for those suing under local law. The States merely exercise a preference in adhering to historic ways of dealing with a claim of fraud; they prefer the traditional way of making unavailable through equity an otherwise valid defense. The State judges and local lawyers who must administer the Federal Employers' Li-

ability Act in State courts are trained in the ways of local practice; it multiplies the difficulties and confuses the administration of justice to require, on purely theoretical grounds, a hybrid of State and Federal practice in the State courts as to a single class of cases. Nothing in the Employers' Liability Act or in the judicial enforcement of the Act for over forty years forces such judicial hybridization upon the States. The fact that Congress authorized actions under the Federal Employers' Liability Act to be brought in State as well as in Federal Courts seems a strange basis for the inference that Congress overrode State procedural arrangements controlling all other negligence suits in a State, by imposing upon State courts to which plaintiffs choose to go the rules prevailing in the Federal courts regarding juries. Such an inference is admissible, so it seems to me, only on the theory that Congress included as part of the right created by the Employers' Liability Act an assumed likelihood that trying all issues to juries is more favorable to plaintiffs. At least, if a plaintiff's right to have all issues decided by a jury rather than the court is 'part and parcel of the remedy afforded railroad workers under the Employers Liability Act,' the Bombolis Case should be overruled explicitly instead of left as a derelict bound to occasion collisions on the waters of the law. We have put the questions squarely because they seem to be precisely what will be roused in the minds of lawyers properly pressing their clients' interests and in the minds of trial and appellate judges called upon to apply this Court's opinion. It is one thing not to borrow trouble from the morrow. It is another thing to create trouble for the morrow." (342 U. S. 368-369.)

Those who joined in the concurring opinion were obviously unable to find distinguishing features in the *Bombolis* case. Appellant respectfully submits that *Dice* and *Bombolis* are, from a standpoint of legal principle,

indistinguishable. Suppose that Ohio had enacted legislation providing for the return of a verdict upon the concurrence of seven members of the jury. Would the principle of the *Bombolis* case still apply? Suppose it were provided that one-third of the members of the jury might reach a verdict where the other two-thirds find it impossible to draw a conclusion either pro or con. Is the result the same, or is there some magic in the term "majority" which finds expression neither in the cases, nor statutes, nor in constitutional provisions?

In citing *Brown v. Western Ry. of Alabama, supra,* in support of its conclusion in the *Dice* case, the majority of the Court recognized the dangers of permitting state rules affecting the substantial rights of a plaintiff to be applied in FELA cases under the guise of mere local rules of procedure. In citing *Bailey v. Central Vermont Ry. Co., supra,* the majority of the Court recognized the right of trial by jury is too fundamental a right afforded workers under the Federal Employers' Liability Act to be denied by the application of local rules. Surely these safeguards apply equally to defendant railroads. In the *Dice* case, the majority of the Court placed heavy reliance upon the necessity of a uniform application of the law under the Employers' Liability Act. In that respect, the Court said:

> "* * * Manifestly the federal rights affording relief to injured railroad employees under a federally declared standard could be defeated if states were permitted to have the final say as to what defenses could and could not be properly interposed to suits under the Act. *Moreover, only if federal law controls can the federal Act be given that uniform application throughout the country essential to effectuate its purposes.* See Garrett v. Moore McCormack Co. 317 US 239, 244, 87 L ed 239, 243, 63 S Ct 246, and cases there cited. * * *" (342 U. S. 361.) (Emphasis supplied.)

Surely appellant is entitled to the benefit of the same principle of uniformity obtaining in favor of the injured employee in the *Dice* case.

4. The Appellate Jurisdiction of the Court is Properly Evoked.

The applicable portion of Section 1257 of the Judicial Code, 28 U. S. C. § 1257 provides as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * (2) By appeal, where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity. * * *"

Appellant does not contend that Section 2315.09 of the Ohio Revised Code, providing for the return of a jury verdict upon the concurrence of three-fourths of the jury members, is invalid in all instances. Appellant contends merely that the statute is invalid as applied to the specific facts involved in the case at bar. The appellate jurisdiction of this Court may be evoked in such situations. *Fiske v. State of Kansas*, 274 U. S. 380 (1927); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282 (1921).

In *Dahnke-Walker Milling Co. v. Bondurant, supra*, the plaintiff, a Tennessee corporation, engaged in operating a flour and feed mill in Tennessee, brought an action in Kentucky against a resident of Kentucky for the breach of a contract for the sale and delivery of a crop of wheat. On a second trial of the cause the trial court directed a verdict against the plaintiff on the ground that it had not complied with a Kentucky statute regarding qualification of foreign corporations to do business in Kentucky. Plaintiff con-

tended that the Kentucky statute was invalid as applied to the specific facts of the case in that the contract was one of interstate proportions and could not, therefore, be governed by the Kentucky statute. Specifically, plaintiff contended that the statute, as applied to the facts of the case before the court, was violative of the Commerce clause of the Constitution of the United States. The Court of Appeals of Kentucky sustained the trial court. This honorable Court reversed the judgment. After noting that the controlling jurisdictional statute was Section 237 of the Judicial Code, the Supreme Court, in an opinion delivered by Mr. Justice Van Devanter, stated:

> "* * * The case is therefore of the class described in the first of the provisions which we have quoted from the jurisdictional section. That the statute was not claimed to be invalid in toto and for every purpose does not matter. A statute may be invalid as applied to one state of facts, and yet valid as applied to another. Poindexter v. Greenhow, 114 U. S. 270, 295, 29 L. ed. 185, 194, 5 Sup. Ct. Rep. 903, 962; St. Louis, I. M. & S. R. Co. v. Wynne, 224 U. S. 354, 56 L. ed. 799, 42 L. R. A. (N. S.) 102, 32 Sup. Ct. Rep. 493; Kansas City Southern R. Co. v. Anderson, 233 U. S. 325, 58 L. ed. 983, 34 Sup. Ct. Rep. 599. Besides a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage. Yazoo & M. Valley R. Co. v. Jackson Vinegar Co., 226 U. S. 217, 57 L. ed. 193, 33 Sup. Ct. Rep. 40; Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 576, 59 L. ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570. Neither does it matter on what ground the court upheld and enforced the statute. The provisions quoted from the jurisdictional section show that in cases where the validity of a state statute is drawn in question because of alleged repugnance to the Constitution, the mode of review depends on the way in which the state court resolves the question. If it be resolved

in favor of the validity of the statute, the review may be on writ of error; and if it be resolved against the validity, the review can only be on writ of certiorari. The provisions take no account of the particular grounds or reasons on which the decision is put." (257 U. S. 289.)

The same principle was reasserted in *Fiske v. State of Kansas, supra,* where the court stated:

> "A decision of a state court applying and enforcing a state statute of general scope against a particular transaction as to which there was a distinct and timely insistence that if so applied, the statute was void under the Federal Constitution, necessarily affirms the validity of the statute as so applied, and the judgment is, therefore, reviewable by writ of error under § 237 of the Judicial Code. Dahnke-Walker Mill Co. v. Bondurant, 257 U. S. 282, 288, 66 L. ed. 239, 242, 42 Sup. Ct. Rep. 106. The inquiry, then, is whether the statute is constitutional as applied and enforced in respect of the situation presented. * * *" (274 U. S. 385.)

In his dissenting opinion, in *Fleming v. Rhodes,* 331 U. S. 100, Mr. Justice Frankfurter furnished additional support for the proposition urged by Appellant. He stated:

> "In Dahnke-Walker Mill. Co. v. Bondurant, 257 US 282, 66 L ed 239, 42 S Ct 106, this Court gave an expansive content to review, as a matter of right, of State court judgments where is drawn in question 'the validity of a statute.' Our jurisdiction was held to cover review of a finding of unconstitutionality in the application of a statute to a particular situation, though the statute is otherwise left in full force and effect. * * *" (331 U. S. 108.)

As has been previously pointed out, the question presented by this appeal has been raised before this Court in numerous other cases, commencing with *Minneapolis &*

St. Louis R. Co. v. Bombolis, supra, page 7. See also: *Chesapeake & Ohio R. Co. v. Kelly, supra,* page 7; *Louisville & Nashville R. Co. v. Stewart, supra,* page 7; *Chesapeake & Ohio R. Co. v. Carnahan, supra,* page 7; and *St. Louis & San Francisco R. Co. v. Brown, supra,* page 7. In each of those cases, review was sought by petition for writ of error and the jurisdiction of this Honorable Court was successfully evoked. Section 1257(2) of the Judicial Code is based upon the former statutes providing for jurisdiction upon writ of error. It was upon the authority of these prior enactments that counsel successfully evoked the jurisdiction of this Court in the *Bombolis* case and the other cases cited therewith. The applicable portions of those sections read as follows:

> "Sec. 236. The Supreme Court shall have appellate jurisdiction in the cases hereafter specifically provided for."
>
> "Sec. 237. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; *or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of their validity* * * * *may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error.* * * *" (Mar. 3, 1911, C. 231 §§ 236, 237, 36 Stat. 1156.) (Emphasis added.)

It will be noted that the italicized portion of old Section 237 is nearly identical to the provisions of present Section 1257(2) of the Judicial Code. It is submitted,

therefore, that Appellant properly evokes the appellate jurisdiction of this honorable Court.

Respectfully submitted,

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APPENDIX A.

Journal Entry of the Court of Common Pleas of Cuyahoga County, Ohio, Overruling Defendant's Motion for New Trial.

(No. 649,338—caption omitted.)

January Term, A. D. 1954

To-wit: April 8th, 1954

Defendant's motion for a new trial is hereby overruled. No record.

DONALD F. LYBARGER,

Judge.

(Filed in the Court of Appeals, Cuyahoga County, April 28, 1954.)

(Filed in the Supreme Court of Ohio November 29, 1954.)

APPENDIX B.

Journal Entry of the Court of Appeals of Cuyahoga County, Ohio, Dismissing Appellant's Appeal.

C.A. 23,182 — C.P. 649,338.

IN THE COURT OF APPEALS

EIGHTH DISTRICT,

STATE OF OHIO, CUYAHOGA COUNTY, SS.

GEORGE LEONARD,

Appellee,

VS.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,

Appellant.

January Term, 1954.

APPEAL BY THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, DEFENDANT-APPELLANT (LAW).

Filed November 5, 1954:

This cause came on to be heard on the appeal on questions of Law from the judgment of the Court of Common Pleas of Cuyahoga County, Ohio and was argued by counsel for the parties; and upon consideration the court finds that the judgment is excessive although not induced by passion and prejudice, that therefore a remittitur of Ten Thousand Dollars ($10,000.00) is ordered. This remittitur having been accepted by the appellee, the judgment of the Court of Common Pleas is hereby modified in conformity with such remittitur and, as modified, to-wit, for the plaintiff-appellee in the sum of Fifty Thousand Dollars ($50,000.00), is affirmed. The court finds no error prejudicial to the appellant and the judgment of the Court of Com-

mon Pleas having been affirmed as modified by this Court, it is ordered that appellee recover of appellant his costs herein taxed.

Said judgment of Fifty Thousand Dollars ($50,000.00) shall bear interest at the rate of six per cent (6%) per annum from the date of the entry of the judgment in the Court of Common Pleas.

The court finds that there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Court of Common Pleas to carry this judgment into execution. Defendant-appellant excepts. (Journal 19, page 504.)

(Duly certified.)

APPENDIX C.

Motion Docket Decision of the Supreme Court of Ohio, February 2, 1955.

34278. *George Leonard, Appellee, v. The New York, Chicago & St. Louis Rd. Co., Appellant.* CUYAHOGA COUNTY. By appellee to dismiss appeal as of right. Sustained. To certify record. Overruled. 28 Ohio BAR, No. 4, Constitutional Law.

APPENDIX D.

Per Curiam Opinion of the Supreme Court of Ohio (162 O. S. 548).

LEONARD, APPELLEE, *v.* THE NEW YORK, CHICAGO & ST. LOUIS RD. CO., APPELLANT.

Supreme Court—Dismissal—No debatable constitutional question involved—Negligence—Action arising under Federal Employers' Liability Act—Verdict—Concurrences necessary—Section 5, Article I, Constitution—Artivle VII, Amendments, U. S. Constitution—Excessive verdict—Remittitur.

(No. 34278—Decided February 2, 1955.)

APPEAL from the Court of Appeals for Cuyahoga County.

Messrs. Bernsteen & Bernsteen and *Mr. Samuel T. Gaines*, for appellee.

Mr. Donald W. Hornbeck, Mr. Edwin Knachel and *Mr. Donald E. Ryan*, for appellant.

It is ordered and adjudged that this appeal as of right be, and the same hereby is, dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

WEYGANDT, C. J., MATTHIAS, HART, ZIMMERMAN, STEWART, BELL and TAFT, JJ., concur.

Office - Supreme Court,
FILED
JUL 6 1955
HAROLD B. WILLEY, C

In the Supreme Court of the United States

No. 142.

OCTOBER TERM, 1955.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,
Appellant,

vs.

GEORGE LEONARD,
Appellee.

MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF OHIO.

SAMUEL T. GAINES,
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Counsel for Appellee.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-9647

TABLE OF CONTENTS.

Motion to Dismiss Appeal From the Supreme Court of Ohio ---- 1

Brief in Support of Motion to Dismiss Appeal ---- 1

Conclusion ---- 10

TABLE OF AUTHORITIES.

Cases.

Brady v. Southern R. Co., 320 U. S. 476 (1943) ---- 6

Brown v. Western Ry. of Alabama, 338 U. S. 294 (1949) ---- 6

Central Vermont R. Co. v. White, 238 U. S. 507 (1915) ---- 6, 7

Dice v. A. C. & Y. R. Co., 342 U. S. 359 ---- 7, 8

Minneapolis & St. Louis R. Co. v. Bombolis, 241 U. S. 211 ---- 4, 6, 7, 8, 9, 10

Urie v. Thompson, 337 U. S. 163 (1949) ---- 6

Zucht v. King, 260 U. S. 174 ---- 10

Constitution.

Constitution of the United States, 7th Amendment ---- 2, 4, 7, 8, 9

Statutes.

Ohio Revised Code, Section 2315.9 ---- 2

United States Code, Title 28, Section 1257, Paragraph 2 ---- 1

Rules.

Revised Rules of the Supreme Court of the United States:

Rule 15 ---------- 10

Rule 16 ---------- 1

In the Supreme Court of the United States

No. 142.

OCTOBER TERM, 1955.

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY,
Appellant,

vs.

GEORGE LEONARD,
Appellee.

MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF OHIO.

Appellee, under favor of Rule 16 of the Revised Rules of this Court, moves to dismiss the appeal on the grounds that

(a) the appeal as to Question 2 is not within the jurisdiction of this Court because not taken in conformity to statute;

(b) the appeal does not present a substantial federal question and the judgment rests on an adequate non-federal basis.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL.

Appellant has appealed under favor of Section 1257 of Title 28, United States Code, Paragraph 2, which reads:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(2) *By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.*" (pp. 2, 16, Appellant's Jurisdictional Statement.)

Questions "presented by this appeal" as set forth in appellant's jurisdictional statement, read:

"1. Whether or not an Ohio statute (Ohio Rev. Code § 2315.09) permitting a jury in civil actions to return a verdict upon the concurrence of three-fourths of their number is void as applied to actions brought pursuant to the Federal Employers' Liability Act, 45 U. S. C. §§ 51 *et seq.*, in view of the Seventh Amendment to the Constitution of the United States, which provides:

* * * * *

2. Whether or not, in actions tried in state courts pursuant to the Federal Employers' Liability Act, 45 U. S. C. §§ 51 *et seq.*, questions concerning the right to and character of trial by jury are matters of 'substance' so as to require the application of federal law."

Question 1, on its face, seeks to draw in question the validity of an Ohio statute upon the ground of its being repugnant to the Constitution of the United States.

Question 2, on the other hand, does not refer to any Ohio statute. It may be assumed that Question 2 was intended to mean something other than Question 1. If so, on its face, it does not concern the validity of any state statute. As to such Question 2, the appeal clearly is not taken in conformity to statute.

As to the claim that Ohio Revised Code Section 2315.9, permitting a less than unanimous verdict in a civil case, is repugnant to the 7th Amendment to the Con-

stitution of the United States, the appeal does not present a substantial federal question.

Appellant's jurisdictional statement concedes that:

"The question raised by this appeal was first posed before this honorable Court in 1916, in the case of *Minneapolis & St. Louis R. Co. v. Bombolis*, 241 U. S. 211. In that case, the court held that the constitution and laws of Minnesota permitting a jury to reach a verdict upon the concurrence of five-sixths of its number was properly applied to an action brought in a state court pursuant to the Federal Employers' Liability Act. The defendant in the *Bombolis* case, like Appellant in this case, contended that the application of Minnesota law resulted in a violation of its right to a unanimous verdict of the members of the jury as required by the Seventh Amendment to the Constitution of the United States. The decision in the *Bombolis* case set at rest the same contention which had been raised in four other cases then pending before the court. *Chesapeake & Ohio R. Co. v. Kelly*, 241 U. S. 485 (1916); *Louisville & Nashville R. Co. v. Stewart*, 241 U. S. 261 (1916); *Chesapeake & Ohio R. Co. v. Carnahan*, 241 U. S. 241 (1916); and *St. Louis & San Francisco R. Co. v. Brown*, 241 U. S. 223 (1916)." (page 7.)

* * * * *

"As has been previously pointed out, the question presented by this appeal has been raised before this Court in numerous other cases, commencing with *Minneapolis & St. Louis R. Co. v. Bombolis, supra*, page 7. See also: *Chesapeake & Ohio R. Co. v. Kelly, supra*, page 7; *Louisville & Nashville R. Co. v. Stewart, supra*, page 7; *Chesapeake & Ohio R. Co. v. Carnahan, supra*, page 7; and *St. Louis & San Francisco R. Co. v. Brown, supra*, page 7." (pages 16, 17.)

The syllabus in *Bombolis* reads:

> "The requirement of U. S. Const., 7th Amend., that trials by jury be according to the course of the common law, i.e., by a unanimous verdict, does not control the state courts, even when enforcing rights under a Federal statute like the employers' liability act of April 22, 1908 (35 Stat. at L. 65, chap. 149, Comp. Stat. 1913, § 8657), and such courts may, therefore, give effect in actions under that statute to a local practice permitting a less than unanimous verdict."

Writing for a unanimous Court, Mr. Chief Justice White states in *Bombolis* that as conclusively determined as is the proposition that the 7th Amendment, where applicable, requires a unanimous verdict, are two other propositions, namely,

> "(a) *that the first ten amendments, including, of course, the 7th, are not concerned with state action and deal only with the Federal action* (citing cases). And, as a necessary corollary, (b) that the 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts, or the standards which must be applied concerning the same (citing cases)." *

Apropos those propositions, the opinion goes on to recite:

> "So completely and conclusively have both of these principles been settled, so expressly have they been recognized without dissent or question almost from the beginning in the accepted interpretation of the Constitution, in the enactment of laws by Congress and proceedings in the Federal Courts, and by state Constitutions and state enactments and proceedings

---

* Emphasis added unless otherwise noted.

in the state courts, that it is true to say that to concede that they are open to contention would be to grant that nothing whatever had been settled as to the power of state and Federal governments or the authority of state and Federal courts and their mode of procedure from the beginning. Doubtless it was this view of the contention which led the supreme court of Minnesota in this case and the courts of last resort of the other states in the cases which were argued with this to coincide in opinion as to the entire want of foundation for the proposition relied upon, and in the conclusion that to advance it was virtually to attempt to question the entire course of judicial ruling and legislative practice, both state and national, which had prevailed from the commencement. And it was, of course, presumably an appreciation of the principles so thoroughly settled which caused Congress, in the enactment of the employers' liability act, to clearly contemplate the existence of a concurrent power and duty of both Federal and state courts to administer the rights conferred by the statute in accordance with the modes of procedure prevailing in such courts. Indeed, it may not be doubted that it must have been the same point of view which has caused it to come to pass that during the number of years which have elapsed since the enactment of the employers' liability act and the safety appliance act, and in the large number of cases which have been tried in state courts, growing out of the rights conferred by those acts, the judgments in many of such cases having been here reviewed, it never entered the mind of anyone to suggest the new and strange view concerning the significance and operation of the 7th Amendment which was urged in this case and the cases which were argued with it.

"Under these circumstances it would be sufficient to leave the unsoundness of the proposition to the demonstration to result from the application of the

previous authoritative rulings on the subject, and the force of the reasoning inherently considered upon which they were based, as also upon its convincing power so aptly portrayed by the opinions of the courts below in this and the other cases which we have said were argued along with this. (citing cases.) In view, however, of the grave misconception of the very fundamentals of our constitutional system of government which is involved in the proposition relied upon and the arguments seeking to maintain it, and the misapplication of the adjudged cases upon which the arguments rest, while not implying that the question is an open one, we nevertheless notice a few of the principal propositions relied upon." (241 U. S. 217, 218, 219.)

The Court's opinion in *Bombolis* then proceeded to dispose of the propositions relied upon by the appellant there.

The jurisdictional statement in the case at bar refers to the following cases:

Brown v. Western Ry. of Alabama, 338 U. S. 294 (1949);

Central Vermont R. Co. v. White, 238 U. S. 507 (1915);

Urie v. Thompson, 337 U. S. 163 (1949);

Brady v. Southern R. Co., 320 U. S. 476 (1943) (page 9.)

The burden of these cases, it is asserted correctly, is that with respect to the federal questions involved in those FELA cases, the state courts entertaining them are bound to follow federal substantive law. The jurisdictional statement continues

"It is upon the proposition asserted in this line of decisions that appellant rests its appeal." (page 10.)

The predicate relied upon by appellant is quicksandish indeed.

Central Vermont R. Co. vs. White, 238 U. S. 507 (1915), for instance, was decided the year before the pronouncement in *Bombolis*. The Supreme Court did not find anything in *White* to conflict with its pronouncement in *Bombolis*. None of the cases upon which appellant "rests its appeal" asserts or implies that state courts in the trial of FELA cases are governed by the U. S. Constitution, 7th Amendment. Certainly nothing in such cases supports appellant's position here.

Anent the fundamental proposition so clearly and plainly set forth in *Bombolis*, appellant's jurisdictional statement recites:

> "Certainly it must be admitted as a general postulate of constitutional law that the first ten amendments to the Constitution of the United States serve as limitations upon federal rather than state authority, except where the rights secured by certain of the first ten have been held to be so fundamental as to require application to state authority under the 'due process' clause of the Fourteenth Amendment, e.g., *Twining v. New Jersey*, 211 U. S. 78 (1908). Even then it is said that such rights are secured as against the states, not because they appear in the first ten amendments, but because they are part and parcel of 'due process.' *Twining v. New Jersey, supra.*" (pp. 6, 8, 9.)

Appellant's jurisdictional statement quotes from the dissent from the Court's opinion in *Dice v. A. C. & Y. R. Co.*, 342 U. S. 359. That very dissent, however, is bottomed on the validity of the decision in *Bombolis*.

The Court's opinion in *Dice* holds that the matter of the validity of a release in an FELA case raises a federal

question. As a federal question it is to be determined by federal, rather than state, law. The Court's opinion viewed the Ohio rule as holding

> "In effect * * * that an employee trusts his employer at his peril and that the negligence of an innocent worker is sufficient to enable his employer to benefit by its deliberate fraud."

Such Ohio view is described in the Court's opinion as

> "* * * harsh * * * (and) wholly incongruous with the general policy of the Act to give railroad employees a right to recover compensation for injuries negligently inflicted by their employers * * * (and) out of harmony with modern judicial and legislative practice to relieve injured persons from the effect of releases fraudulently obtained." 342 U. S. 359, 362.

The Court's opinion in *Dice* distinguished *Bombolis*. It pointed out that Ohio law "provides and has here accorded petitioner the usual jury trial of factual issues relating to negligence," and held that the Ohio rule which seeks "to single out one phase of the question of fraudulent releases for determination by a judge instead of a jury" is inapplicable to an action under the FELA.

The Court's opinion in *Dice*, however, is not bottomed upon the applicability of the 7th Amendment to the Constitution of the United States. Nothing contained in such opinion holds that the jury to which plaintiff was entitled in the circumstances of that case, would have to be a common law jury.

The only question presented on this appeal, concededly, is precisely the question raised and disposed of in *Bombolis*. The fundamental doctrine clearly set forth in *Bombolis* remained unchallenged for almost four decades.

To entertain this appeal would be to concede that open to contention are the propositions so decisively pronounced in *Bombolis*.

(a) "that the first 10 Amendments, including, of course, the 7th, are not concerned with state actions and deal only with the federal action and, as a necessary corollary,

(b) that the 7th Amendment applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in state courts or the standards which must be applied concerning the same." (241 U. S. 217.)

Those propositions clearly are not open to contention.

Disposing of the argument advanced in *Bombolis* that the 7th Amendment is applicable to territorial courts, wherefore it ought to be equally applicable to FELA cases tried in state courts, the Court's opinion in that case after pointing out that such courts were "created by Congress" and exercised jurisdiction "alone by virtue of power conferred by the United States," recites:

> "But this (applicability of 7th Amendment to territorial courts) affords no ground for the proposition that the Amendment is applicable and controlling in proceedings in state courts deriving their authority from state law in the teeth of the express and settled doctrine that the Amendment does not relate to proceedings in state courts" (241 U. S. 220.)

The judgment below as to the validity of less than a unanimous jury verdict plainly rests on an adequate nonfederal basis.

CONCLUSION.

Rule 15 of the Revised Rules of the Supreme Court of the United States, effective July 1, 1954, requires that in the jurisdictional statement of appellant:

> "There shall be included a presentation of the grounds upon which it is contended that the federal questions are substantial (*Zucht v. King*, 260 U. S. 174, 176, 177)."

The *Zucht* case held that where prior decisions of this Court had settled the contentions urged by the plaintiff in error in that case, there was raised "no question as to the validity of the ordinance sufficiently substantial to support the writ of error." In the light of the long-established and settled concept anent "the very fundamentals of our constitutional system of government" so clearly set forth in *Bombolis*, this appeal certainly raises no substantial federal question.

The motion to dismiss should be granted.

Respectfully submitted,

SAMUEL T. GAINES,

Counsel for Appellee.

FILED
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HAROLD B. WILLEY,

In the Supreme Court of the United States

No. 142.

OCTOBER TERM, 1955.

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Appellee.

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF OHIO.

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BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL.

The motion of the appellee is based upon two propositions: (a) the contention that Question No. 2 of the appellant's jurisdictional statement does not present a federal question, and (b) the contention that the appeal does not present a substantial federal question.

The appellee's contentions are treated separately herein as they appear.

In respect of contention (a), the appellee assumes that every question presented in a jurisdictional statement must set forth a separate and complete ground of federal jurisdiction. Rule 15(c)(1) of the Rules of the Supreme Court of the United States provides that a jurisdictional statement shall include:

> "The questions presented by the appeal, expressed in the terms and circumstances of the case but without unnecessary detail. The statement of the question should be short and concise, should not be repetitious, and should not resemble in form or particularity the

former assignments of error which are abolished by paragraph 4 of Rule 10. The statement of a question presented will be deemed to include every subsidiary question fairly comprised therein. * * *"

Although the appellant's Question No. 2 may actually be considered a "subsidiary question fairly comprised" in Question No. 1, Rule 15(c)(1) certainly does not require, either by express language or by implication, that each question set forth in a jurisdictional statement shall constitute a separate and independent ground of federal jurisdiction. It is significant that the appellee cites no authority to the contrary in support of his contention (a).

The appellee's contention (b) reaches the heart of this question as presented before all of the courts below. The appellee has maintained steadfastly that the Seventh Amendment to the Constitution of the United States is inapplicable to the case at bar because trial was held in a state court. The appellee has just as steadfastly refused to acknowledge that there is a distinction between a case where the jurisdiction of the state court is founded upon state common law or statutory principles and a case where the jurisdiction of the state court is provided by federal enactment and is concurrent with the jurisdiction of the federal courts.

The Seventh Amendment to the Constitution of the United States providing for the right to trial by a jury in civil cases has been construed by the Supreme Court as requiring a unanimous verdict of twelve jurors in cases tried in the federal courts where the right of trial by jury prevailed at common law. *Maxwell v. Dow*, 176 U. S. 586 (1900). It is readily conceded, however, and has been conceded from the first by the appellant herein, that the Seventh Amendment has no application to cases tried in the courts of the various states wherein jurisdiction is founded upon state law. The appellant urgently contends,

however, that the contrary is true where a federal enactment both creates a cause of action and establishes concurrent jurisdiction over such action between state and federal courts as in the case of the Federal Employers' Liability Act.

In *Brown v. Western Ry. of Alabama*, 338 U. S. 294 (1949), and cases of similar import,[1] it was held that *FELA* cases tried in state courts require the application of state law to matters of "procedure" and federal law to matters of "substance." The appellee has consistently refused to acknowledge either the existence of the principle asserted in the *Brown* case or the applicability thereof to questions involving the right to and character of trial by jury. It cannot be over-emphasized that the majority of this Honorable Court has already applied the principle of the *Brown* case to a question involving the right to trial by jury in *Dice v. Akron, Canton and Youngstown Railroad Company*, 342 U. S. 359, 363 (1952). Indeed, the court in that case went so far as to state that the right to trial by jury is "too substantial a right accorded by the Act (Federal Employers' Liability Act) to be classified as 'a mere local rule of procedure.'"

The appellant respectfully submits that there is no distinction in principle between the Dice case and the case at bar. This Honorable Court has by its decision in the Dice case overruled the prior decision reached in Minneapolis and St. Louis Railroad Company v. Bombolis, 241 U. S. 211 (1916), as assuredly as though it had done so by express language. Mr. Justice Frankfurter, Mr. Justice Reed, Mr. Justice Jackson and Mr. Justice Burton, who concurred for reversal in the Dice case but dissented from

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[1] *Urie v. Thompson*, 337 U. S. 163 (1949); *Brady v. Southern R. Co.*, 320 U. S. 476 (1943); *Central Vermont Railroad Company v. White*, 238 U. S. 507 (1915).

the reasoning of the majority, clearly recognized the necessity for overruling the Bombolis decision and the dangers attendant upon a failure so to do. One of the most significant statements in the concurring opinion clearly points the way. It reads as follows:

> **"* * * At least, if a plaintiff's right to have all issues decided by a jury rather than the court is 'part and parcel of the remedy afforded railroad workers under the Employers Liability Act,' the Bombolis Case should be overruled explicitly instead of left as a derelict bound to occasion collisions on the waters of the law.' * * *" (342 U. S. 369.)**

The *Bombolis* "derelict" emerged damaged but still afloat from her collision with *Dice*. So long as she remains afloat there will occur repeated "collisions on the waters of the law." Surely the "derelict" should in the interest of clarity and the uniform application of the law be sent to the bottom at the first available opportunity. Such an opportunity is here presented to the Court.

Appellant submits that the Supreme Court of Ohio erred in refusing to grant the appellant's appeal as a matter of right, and that appellant was entitled in this action to a unanimous verdict of twelve jurors in accordance with the Seventh Amendment of the Constitution of the United States. Appellant therefore requests that appellee's motion to dismiss the appeal be dismissed.

Respectfully submitted,

EDWIN KNACHEL,
DONALD E. RYAN,
RICHARD C. OGLINE,
Counsel for Appellant.

DONALD W. HORNBECK,
Of Counsel.

No. 142. NEW YORK, CHICAGO & ST. LOUIS RAILROAD Co. *v.* LEONARD. Appeal from the Supreme Court of Ohio. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Edwin Knachel, Donald E. Ryan* and *Richard C. Ogline* for appellant. *Samuel T. Gaines* for appellee. Reported below: 162 Ohio St. 548, 124 N. E. 2d 156.